STATE OF SOUTH CAROLINA **COUNTY OF RICHLAND**	)	**BEFORE THE CHIEF PROCUREMENT OFFICER FOR CONSTRUCTION**
IN THE MATTER OF: CONTROVERSY	)	**CASE NO. 2007-004**
ENVIRONMENTAL ENTERPRISE GROUP, INC. **vs.** **CHARLESTON NAVAL COMPLEX REDEVELOPMENT AUTHORITY**	)	**ORDER APPROVING SETTLEMENT** **POSTING DATE: July 19, 2007**
STATE DEPARTMENT PARKING LOT AND DEMOLITION STATE PROJECT M10-N065-MJ	)	

This matter is before the Chief Procurement Officer for Construction (CPOC) pursuant to a request from Environmental Enterprise Group, Inc. (EEG), under the provisions of §11-35-4230 of the South Carolina Consolidated Procurement Code ("the Code"), for an administrative review on the Charleston Naval Complex State Department Parking Lot and Demolition Project ("the Project") for the Charleston Naval Complex Redevelopment Authority ("the Authority"). EEG alleged the Authority improperly assessed EEG with liquidated damages, and alleged that EEG was entitled to delay damages for delays caused by the Authority during the performance of the Contract. (The allegations of EEG are attached as Exhibit "A"). Pursuant to §11-35-4210(3) of the South Carolina Code, the CPOC evaluated the issues for potential resolution by mutual agreement, determined that mediation was appropriate, and appointed a mediator. The attempt to mediate was successful and the parties presented the CPOC with a proposed consent agreement executed by the parties. This consent agreement settles all matters in dispute raised in EEG's request for administrative review.

CPOC FINDINGS

Based on a review of facts and issues surrounding this controversy, the CPOC finds that the parties engaged in good faith, free, and full discussions leading to a mutually agreeable settlement. It is the finding of the CPOC that the consent agreement as submitted by the two parties is both a complete settlement of the dispute and an

acceptable resolution of the dispute. The CPOC further finds that the acceptance of the consent agreement is in the best interests of the State.

DECISION

The consent agreement proposed by the parties is hereby attached as Exhibit "B" and made a part of this decision. Under the authority granted by §11-35-4230(3) of the Code, the CPOC hereby approves the settlement agreement as set forth in Exhibit B. Based on the parties' mutual good faith commitment to perform as set forth in the settlement agreement, the CPOC dismisses the request for administrative review filed by EEG.

John St. C. White
Chief Procurement Officer
For Construction

19 July 07
Date

Columbia, South Carolina

STATEMENT OF THE RIGHT TO APPEAL

The South Carolina Procurement Code, under Section 11-35-4210, subsection 6, states:

> *A decision under subsection (4) of this section shall be final and conclusive, unless fraudulent, or unless any person adversely affected by the decision requests a further administrative review by the Procurement Review Panel under Section 11-35-4410(1) within ten calendar days of posting of the decision in accordance with Section 11-35-4210(5). The request for review shall be directed to the appropriate chief procurement officer, who shall forward the request to the Panel, or to the Procurement Review Panel and shall be in writing, setting forth the reasons why the person disagrees with the decision of the appropriate chief procurement officer. The person may also request a hearing before the Procurement Review Panel.*

Additional information regarding the protest process is available on the internet at the following web site: http://www.state.sc.us/mmo/legal/lawmenu.htm

FILING FEE: Pursuant to Proviso 66.1 of the 2004 General Appropriations Act, "[r]equests for administrative review before the South Carolina Procurement Review Panel shall be accompanied by a filing fee of two hundred and fifty dollars ($250.00), payable to the SC Procurement Review Panel. The panel is authorized to charge the party requesting an administrative review under the South Carolina Code Sections 11-35-4210(6), 11-35-4220(5), 11-35-4230(6) and/or 11-35-4410(4). . . . . Withdrawal of an appeal will result in the filing fee being forfeited to the panel. If a party desiring to file an appeal is unable to pay the filing fee because of hardship, the party shall submit a notarized affidavit to such effect. If after reviewing the affidavit the panel determines that such hardship exists, the filing fee shall be waived." 2004 S.C. Act No. 248, Part IB, § 66.1. PLEASE MAKE YOUR CHECK PAYABLE TO THE "SC PROCUREMENT REVIEW PANEL."

LEGAL REPRESENTATION: In order to prosecute an appeal before the Panel, a business must retain a lawyer. Failure to obtain counsel will result in dismissal of your appeal. Protest of Lighting Services, Case No. 2002-10 (Proc. Rev. Panel Nov. 6, 2002) and Protest of The Kardon Corporation, Case No. 2002-13 (Proc. Rev. Panel Jan. 31, 2003).

EXH. #A

LAW OFFICES

CARLOCK, COPELAND, SEMLER & STAIR, LLP

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REPLY TO SC OFFICE

May 31, 2007

VIA CERTIFIED MAIL, RETURN RECEIPT REQUESTED

John St. C. White, P.E.
State Engineer and Chief Procurement Officer for Construction
Materials Management Office
1201 Main Street, Suite 600
Columbia, SC 29201

Re: Project: State Department Parking Lot & Demolition (OSE Project M10-N065-MJ)
My Client: Environmental Enterprise Group, Inc.
State Agency: Charleston Naval Complex Redevelopment Authority
CCSS File #: 2800-33904

Dear Mr. White:

Pursuant to S.C. Code § 11-35-4230, this letter is a request for resolution on behalf of Environmental Enterprise Group, Inc. ("EEG") regarding the above-referenced project. This claim is being filed with you within one year of June 19, 2006, the last date that EEG worked on the Project. EEG seeks the recovery of $29,250 of step 1 liquidated damages which were assessed by the Charleston Naval Complex Redevelopment Authority ("RDA"). Further, EEG asserts that it is entitled to recover damages caused by the delays associated with the design provided by Davis & Floyd, the project engineer.

CLAIM TO RECOVER LIQUIDATED DAMAGES ASSERTED BY RDA

By way of background, I have attached EEG's notice of claim (exhibit "1") and the RDA's response (SEE RDA letter dated 8/1/06 attached as exhibit "2."). No decision was ever formally rendered on the notice of claim, but the step 2 liquidated damages referenced in the exhibits were released by the RDA. Accordingly, this component of the claim is limited to the recovery of $29,250 of step 1 liquidated damages. The contractual substantial completion date was September 18, 2005 and the actual substantial completion date was March 31, 2006 which was 195 days later. EEG was assessed with liquidated damages for the entire 195 day time period. However, because the delays

were caused by the RDA's engineer and project conditions beyond any party's control, the assessment of liquidated damages was not proper.

The primary Project delays were associated with the failure of the engineer to timely determine the location of the BMP Stormceptors. The installation of the BMP Stormceptors was a critical path item since all drains run to these outlets. There was simply no mechanism in place to tie in the drains until the Stormceptors were designed and installed. Without a determination on the location of the Stormceptors, it was not even possible to order the Stormceptors because the inlet/outlet elevation and piping orientation were not known.

EEG first requested clarification regarding the location of the Stormceptors in May 2005, and the RDA responded on May 19, 2005 with an e-mail stating that Davis & Floyd will determine the location (e-mail included with exhibit "1"). At that time, the RDA and Davis & Floyd were notified that the Stormceptors were a critical path item. Further, Davis & Floyd, based on its experience and background, certainly was aware that the drainage pipes could not be installed without the Stormceptors. Indeed, if the Stormceptors had been ordered in May, the eventual changes in the design would have resulted in a re-ordering of the Stormceptors at a cost to the RDA of $45,603.

The final design indicating the location of the Stormceptors was not provided by Davis & Floyd until August 18, 2005. The Stormceptors were immediately ordered and delivered to the site on September 1, 2005, just 18 days before the initial substantial completion. Clarifications regarding the Stormceptors design were sought and answered through out September. Clearly, it was obvious to the RDA and Davis & Floyd that the contract could not be completed by September 19th given the lack of information provided about the Stormceptors and the delays resulting therefrom. The design errors associated with the location of the Stormceptors accounts for approximately 120-130 delay days.

There were several project conditions that were beyond EEG's control and delayed the Project. For example, on July 26, 2005, EEG notified the RDA that it struck fuel oil contaminated soil, and that due to multiple obstacles, the substantial completion date was not achievable. The RDA struggled with how to resolve the full contamination before finally requesting that the soil be delivered to a landfill off site. The failure to timely decide on how to best handle the contaminated soil, and the time it took to deliver the soil off site, resulted in numerous delay days. Also, following the delivery of the Stormceptors, severe weather delayed the Project for 47 days. The weather delays were beyond any party's control, and should have resulted in an equitable adjustment of the substantial completion date. The RDA was aware that events beyond EEG's control resulted in the project delays, yet they assessed liquidated damages. The RDA was put on notice of these delay items verbally and through multiple e-mails which are included as part of Exhibit "1."

Under the *Spearin* doctrine, the RDA is responsible for delays caused by the design. Further, delays caused by events beyond anybody's control, such as the weather delays, are not delays upon which liquidated damages can be assessed. The RDA's primary basis in asserting liquidated damages appears to be that EEG did not submit a formal claim seeking an extension of the substantial completion date. However, given the litany of e-mails and the constant verbal communication, the

RDA was certainly aware of the delays. Similarly, they were clearly put on notice as to the causes of the delays. Relying on the lack of formal notice is not sufficient or equitable. "Notice provisions in contract adjustment clauses [shall] not be applied too technically and liberally where the government is quite aware of the facts." *Hoel-Steffen Constr. Co. v. United States*, 456 F.2d 760 (Ct. Cl. 1972). (Also see, *Brinderson Corp. v. Hampton Road Sanitation District*, 825 F.2d 41 (4th Cir. 1987)). In *Brinderson*, liquidated damages were overturned, and the contractor was awarded an equitable adjustment in the contract price despite not following formal contract requirements in reporting delays. The 4th circuit held that actual notice of the delays was sufficient despite the contract language requiring written formal notice. Just like in this case, the owners were notified informally of the delays, and their representatives were given an opportunity to investigate the causes of the delays. The RDA should not be permitted to hide behind the contract documents in assessing liquidated damages for delays not actually caused by EEG and which were in part caused by the design.

Lastly, the assessed liquidated damages should be reversed because the RDA suffered no actual damages. Under South Carolina law, liquidated damages provisions are unenforceable when there are no actual damages. See, *Lewis v. Premium Investment Corporation*, 351 S.C. 167, 568 S.E.2d 361 (2002). This project involved the construction of a parking lot for the State Department. The State Department had ample parking available to it during the construction at adjacent lots, and at no time was there a parking shortage (See exhibit "3", photographs of project and available adjacent parking lots). Indeed, the State Department was satisfied with the timing of the construction and did not complain about any delays as evidenced by the letter attached hereto as exhibit "4." The State Department, the end user, did not seek any damages from the RDA. The RDA suffered no damages caused by the delays, and the assessment of liquidated damages is an unenforceable penalty.

In conclusion, the assessment of step 1 liquidated damages should be overturned because EEG did not cause the delays, the RDA was on actual notice of the delays, and the assessment of liquidated damages is an unenforceable penalty.

EEG IS ENTITLED TO RECOVER DELAY DAMAGES FROM THE RDA

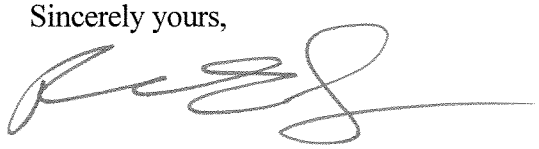
EEG has suffered significant damages resulting from the project delays. As previously stated, approximately 130 delay days were associated with Davis & Floyd's failure to provide a proper design for the Stormceptors. According to the *Spearin* doctrine, the RDA is responsible for the delay damages caused by its design professional. Under *Brinderson*, the RDA's actual notice of the delays is sufficient to enable a contract revision awarding EEG delay damages. Accordingly, EEG seeks recovery of damages associated with additional overhead costs resulting from the previously referenced delays, and requests that the total contract amount be adjusted to reflect the damages amount. The additional overhead costs include $5,212 for equipment rental, $57,617 in additional salaries for the superintendent/project manager and various additional expenses that have not been completely computed. What is clear is that EEG lost approximately $165,000 on the project, not including the assessed liquidated damages, and a significant portion of the losses are associated with

additional overhead costs. Although the amount of the total delay damages claim has not been completely computed, the total delay damages are probably between $100,000 and $200,000.

CONCLUSION

EEG is entitled to the recovery of $29,250 in assessed liquidated damages and is also entitled to an adjustment of the contract amount to reflect additional overhead costs associated with delays caused by the RDA or its design professionals. Please conduct an administrative review of this claim as soon as possible, and let me know if you need further information in order to assess this claim. I look forward to working with you in achieving a resolution. With kind regards, I am

Sincerely yours,



PAUL E. SPERRY

PES:fas
Enclosures
cc: Wilbur E. Johnson, Esq. (counsel for RDA)
Mr. Richard A. Albers
Mr. J. N. Kevin Tunstall

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EXH. #B

Consent Agreement

RE: State Department Parking Lot & Demolition
M10-N065-MJ
Charleston Naval Complex Redevelopment Authority
Charleston, SC

Date: July 5, 2007

The Carlock, Copeland, Semler & Stair, LLP letter requesting mediation, dated 31 May 2007, was forwarded to the Office of State Engineer by Mr. Paul Sperry on behalf of EEG, Inc.

This Agreement is reached through mutual understanding of the issues causing the dispute and a mutually agreed-upon resolution concerning all the items related to the dispute. This Agreement does not constitute an admission of any kind or for any reason by any party.

By this Agreement, the Owner (RDA) agrees to forward the amount retained as Step 1 Liquidated Damages in the amount of $29,250 to the contractor (EEG, Inc.).

Robert Ryan
Executive Director, RDA

Kevin Tunstall
President, EEG, Inc.

Phil C. Gerald, PE
Office of State Engineer